

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

PIERRE FACUSSE,

Defendant and Appellant.

B267326

(Los Angeles County
Super. Ct. No. BA409241)

APPEAL from a judgment of the Superior Court of Los Angeles County, Robert Perry, Judge. Affirmed.

Vanessa Place, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Scott A. Taryle, Supervising Deputy Attorney General, John Yang, Deputy Attorney General, for Plaintiff and Respondent.

Defendant and appellant Pierre Facusse was convicted by jury of rape of an intoxicated woman (Pen. Code, § 261, subd. (a)(3))¹ and forcible rape (§ 261, subd. (a)(2)).² The trial court sentenced defendant to six years in state prison.

In his timely appeal, defendant argues the conviction must be reversed because comments of the trial court in response to a jury question during deliberations abrogated the constitutional standard of proof beyond a reasonable doubt. We affirm.

FACTS

The issue raised on appeal is not dependent on the facts at trial, which we therefore briefly summarize in the light most favorable to the judgment. The victim met with a coworker and his friends at a bar in Hollywood after work on September 20, 2011. After consuming three or four drinks, the victim began “to not feel too well.”

The victim left the bar to walk to her car, which was parked several blocks away. A man asked if she was okay. She said no and sat down, feeling like she needed to vomit. The man helped her up and supported the victim as they walked. They ended up at the Vibe hotel, a few blocks from the bar where the victim had been drinking.

The victim was directed toward a small bathroom, where she braced over the sink, wanting to vomit. The man who assisted her came into the bathroom. He pulled down the victim’s pants and underwear and penetrated her vagina with his penis from behind. She told him to stop but “he just kept on doing what he wanted to do.” She felt him ejaculate. The victim tried to call her boyfriend on the phone during the attack but did not think the call went through. The victim did not know defendant and did not ever have a consensual encounter with him. Only parts of the incident were clear to her.

¹ Statutory references are to the Penal Code unless otherwise stated.

² Because there was one act of rape, which violated two subdivisions of section 261, the counts were consolidated and a single sentence was imposed.

The victim did not report the attack to the police until it was suggested by her ex-boyfriend after the victim told him she had been raped. When she went to the police station, she brought the dress and tights she was wearing on the night of the attack. The items were booked into evidence for later analysis. DNA comparison of portions of the victim's tights containing semen with a reference sample from defendant revealed a match. Defendant's DNA profile in the United States occurs in the following frequencies: 1 out of 58 quintillion³ in the Caucasian population; 1 in 7.1 quintillion of the African-American population; and 1 in 26 quintillion in the Hispanic population. Defendant told a detective he had never seen the victim.

DISCUSSION

Defendant argues the trial court committed prejudicial error in its discussion of proof beyond a reasonable doubt both in jury selection and in responding to a juror's indication of a need for help with the definition of reasonable doubt. Citing the various cases that have reversed judgments where trial courts have likened the burden of proof to decisions made in daily life, defendant argues the trial court "abrogated" the presumption of innocence and the requirement of proof beyond a reasonable doubt.

Background

Voir Dire and Pre-Instruction

The court began its questioning of jurors by explaining that a defendant is presumed to be innocent until the contrary is proven beyond a reasonable doubt, and the burden of proof is on the prosecutor. The court emphasized these principles by explaining that a defendant does not have to prove his innocence, the prosecutor has to

³ Quintillion is a number followed by 18 zeroes.

convince the jury or the verdict is not guilty, and the standard of proof in every case is beyond a reasonable doubt. The court stated that “we define proof beyond a reasonable doubt as the kind of proof that makes you so sure you have an abiding conviction in the truth of the charge. Now, what does that mean? That means you have a lasting belief that the person did what he’s accused of doing. Okay. And that means not just today and tomorrow, but five years, ten years down the road you can look back and say, yes, based on the evidence we heard, we made the right decision. If you don’t have that comfort level, then the case was not proven beyond a reasonable doubt. And again, I remind you it’s up to the People to convince you.”

Jury Questions During Deliberations and the Trial Court’s Responses

Jury deliberations commenced at 2:15 p.m. on July 28, 2015. At 2:33 p.m. on July 29, the court held a hearing outside the presence of the jury after the jury asked for “[g]uidance on items 3 and 4 on count 3.” The trial court and counsel surmised that the jury was asking about elements three (consent) and four (force, violence, duress and fear of immediate and unlawful bodily injury) of the forcible rape charge in count 3. The court stated that element three was “very easy” and already defined in the instruction. The court intended to inform the jury that it need not find each of the various component parts of element four and expressed the belief that the theory of guilt was a rape by use of force. Defense counsel requested the court to simply tell the jury that the instructions are the law and the court could not tell the jury anything more than was in the instructions. The court stated that it was obligated to answer the question and do what it could to help.

The jury returned to the courtroom. The court read CALCRIM No. 1000 to the jury: “To consent, a woman must act freely and voluntarily and know the nature of the acts.” The court explained that this instruction “defines consent.” The court further read from CALCRIM No. 1000: “Intercourse is accomplished by force if a person uses enough physical force to overcome the woman’s will.”

The court asked the jury to “tell me what you need further in terms of definitions or do you need something further?” Juror No. 12 stated that the group could not come to a unanimous decision on the third element relating to consent. The court replied that consent was the issue that was litigated in the case. The jury must make the decision and the court could not help with that except to ask the jury to think about it, and if the jury would like to hear all or some portion of the victim’s testimony again it would be reread.

Juror No. 5 then stated, “I think we’re wondering the definition of beyond a reasonable doubt.” The court reread the definition of reasonable doubt from CALCRIM No. 220: “Proof beyond a reasonable doubt is proof that leaves you with an abiding conviction that the charge is true. [¶] The evidence need not eliminate all possible doubt because everything in life is open to some possible or imaginary doubt.”

The court then turned to the meaning of an abiding conviction, telling the jury as follows: “Now, abiding, I think we told you in jury selection, is a word that means lasting. I think the example is given that you must have a lasting belief based on the evidence. That means not just for today but 5 years, 10 years down the road you can say yes, based on the evidence, we made the right decision.”

The court explained why it could not further define reasonable doubt: “Now, let me tell you this: judges have been warned time and again not trying to further define this definition. What do I mean? I mean, one judge talked about it, if all of you jump out of an airplane you’re going to hit the ground if you don’t have a parachute. I don’t know what he was talking about. But the point is we’re not to try to define this. What is reasonable for one person [may] not be reasonable for somebody else. But we ask you to use the collective reasoning and to consider each other’s opinion and evaluate the case.”

The court invited counsel to meet at sidebar. The court explained it was considering reading CALCRIM No. 3551 (“Further Instructions to the Jury”) to the jury. The court stated that the jury did not say it was hung, and defense counsel replied that if the jury was not hung, CALCRIM No. 3551 should not be read. The court decided to

give read the instruction over defense counsel's objection to give the jury "a pep talk."

The court then read CALCRIM No. 3551⁴ as follows:

"Sometimes jurors that have had difficulty reaching a verdict are able to resume deliberations and successfully reach a verdict on one or more counts. Please consider the following suggestions. [¶] Do not hesitate to reexamine your own views. [Fair] and effective jury deliberations require a frank and forthright exchange of views. Each of you must decide the case for yourself and form your individual opinion after you have fully and completely consider[ed] all of the evidence with your fellow jurors. [¶] It is your duty as jurors to deliberate with the goal of reaching a verdict, if you can do so, without surrendering your individual judgment. Do not change your position just because it differs from that of other jurors or just because you or others want to reach a verdict. Both the People and the Defendant are entitled to the individual judgment of each juror. [¶] It is up to you to decide how to conduct your deliberations. You may want to consider new approaches in order to get a fresh perspective. Let me know whether I can do anything to help you further, such as give additional instructions or clarify instructions I have already given you. Please continue your deliberations at this time. If you wish to communicate with me further, please do so in writing."

After finishing with the instruction, the trial court advised the jury: "I don't know if that's helpful or not. We're pretty early in the game in terms of deliberating on this case. I know that the case was stretched out regrettably over a number of days because of witness scheduling issues but I thought you jurors were quite attentive, and I'd ask you to go back and continue your deliberations and talk about things. Use your reason and your common sense when you analyze the evidence. Okay. Thank you very much."

The jury resumed deliberations at 2:56 p.m. The jury returned guilty verdicts at 11:30 a.m. next morning.

⁴ The essential elements of CALCRIM No. 3551 were approved in *People v. Moore* (2002) 96 Cal.App.4th 1105, 1118, prior to the Judicial Council formally adopting the instruction.

Analysis

Our review of the record indicates the trial court did not lower the prosecution's burden of proof, as argued by defendant. Beginning with the proceedings on voir dire, the court emphasized the presumption of innocence and the prosecution's burden to prove guilt beyond a reasonable doubt. The court carefully explained that defendant had no burden, it was the prosecutor's job to convince the jury, and the standard in every case is beyond a reasonable doubt. The court stated that proof beyond a reasonable doubt "makes you so sure you have an abiding conviction in the truth of the charge." The court explained that abiding conviction "means not just today and tomorrow, but five years, ten years down the road you can look back and say, yes, based on the evidence we heard, we made the right decision. If you don't have that comfort level, then the case was not proven beyond a reasonable doubt. And again, I remind you it's up to the People to convince you." There was no objection to this portion of the voir dire, and defendant does not assert error in the court's description of the presumption of innocence and proof beyond a reasonable doubt.

The court's response to the jury questions did not undercut the requirement of proof beyond a reasonable doubt. The court fulfilled its duty under section 1138⁵ by specifically answering the jury's question regarding the elements of count 3 by rereading the pertinent portion of the pattern instructions. When a juror indicated the jury could not decide as to consent, the court properly stated it could not help the jury but suggested that testimony could be reread if that would be of assistance. Although defense counsel asked the court to merely refer the jury to the instructions, the court instead reasonably choose

⁵ Section 1138 provides as follows: "After the jury have retired for deliberation, if there be any disagreement between them as to the testimony, or if they desire to be informed on any point of law arising in the case, they must require the officer to conduct them into court. Upon being brought into court, the information required must be given in the presence of, or after notice to, the prosecuting attorney, and the defendant or his counsel, or after they have been called."

to reread the pertinent portions, and defendant makes no claim of error on appeal as to the court's decision to do so.

In response to a juror's inquiry regarding "the definition of beyond a reasonable doubt," the court reread CALCRIM No. 220, the pattern instruction containing the approved definition of reasonable doubt. The court then turned to the meaning of an abiding conviction, telling the jury as follows: "Now, abiding, I think we told you in jury selection, is a word that means lasting. I think the example is given that you must have a lasting belief based on the evidence. That means not just for today but 5 years, 10 years down the road you can say yes, based on the evidence, we made the right decision." The court accurately described what the jurors had been told during voir dire, and no objection was made by defense counsel to these comments either during jury selection or the court's colloquy with the jury.

Defendant's argument focuses on what occurred next. The court explained why it could not further define reasonable doubt with an example of how another court had gone astray by doing so. "Now, let me tell you this: judges have been warned time and again not trying to further define this definition. What do I mean? I mean, one judge talked about it, if all of you jump out of an airplane you're going to hit the ground if you don't have a parachute. I don't know what he was talking about. But the point is we're not to try to define this. *What is reasonable for one person [may] not be reasonable for somebody else.* But we ask you to use the collective reasoning and to consider each other's opinion and evaluate the case." (Italics added.)

Defendant argues the court's comments impermissibly diluted the presumption of innocence by suggesting the jurors use "collective reasoning" rather than their individual judgment. This is incorrect. The court specifically referenced what might be reasonable for one person but not another, indicating the decision is a personal one. The court properly asked the jurors to consider the opinions of other jurors and evaluate the case, but the court's words never suggested that the jurors should abandon their own beliefs in favor of what took place. Defendant's contention ignores that portion of CALCRIM No. 3551 read to the jury that explains, "Each of you must decide the case for yourself and

form your individual opinion after you have fully and completely considered all of the evidence with your fellow jurors.” Given this language, we cannot see how the jurors might have believed that anything less than their individual decisions were required for a verdict.

Defendant also argues the court’s reference to a case in which another judge related proof beyond a reasonable doubt to a skydiver without a parachute put an improper analogy before the jury and suggested the confidence of the jurors should be “less rigorous than that wanted by someone jumping from an airplane.” Again, the court did not suggest anything to diminish the presumption of innocence. The court instead belittled the error of the other court by stating, “I don’t know what he was talking about. But the point is we’re not to try to define this.” In context, the court explained that it could not provide a definition beyond that set forth in CALCRIM No. 220.

Finally, defendant argues that a hypothetical question involving circumstantial evidence asked by the prosecutor during voir dire “distracted from the Government’s affirmative burden of proof by suggesting there needed to be an alternative explanation (other than guilt), for the state of the prosecution’s evidence.” The contention does not warrant extended discussion. First, there was no objection to the prosecutor’s hypothetical questioning of the jurors, and the issue is therefore forfeited. (*People v. Medina* (1995) 11 Cal.4th 694, 741.) Second, reasonable hypothetical questions may be asked by the prosecutor during voir dire. (*People v. Tully* (2012) 54 Cal.4th 952, 100-1001.) Third, the prosecutor’s use of the hypothetical fact pattern here did not suggest that a lower burden of proof should be applied, but instead it gauged how individual jurors would view a set of circumstantial facts entirely unrelated to the fact pattern in the case. It is not improper for a prosecutor to gauge a juror’s willingness to rely on circumstantial evidence. (See *People v. Zambrano* (2007) 41 Cal.4th 1082, 1106-1107⁶ [prosecutor’s peremptory challenge of juror who would might be reluctant to convict based on circumstantial evidence was not improper].) And fourth, the court properly

⁶ Disapproved on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22).

instructed the jury on several occasions on the correct standard of proof beyond a reasonable doubt, and the jury was admonished if “the attorneys’ comments on the law conflict with my instructions, you must follow my instructions.” There is no reason to believe the prosecutor’s insignificant hypothetical question during jury selection was considered by any juror as overruling the court’s description of the burden of proof. (See *People v. Morales* (2001) 25 Cal.4th 34, 47-48 [“[t]he trial court emphasized this rule when, as stated, it instructed the jury to follow its instructions and to exalt them over the parties’ arguments and statements”].)

DISPOSITION

The judgment is affirmed.

KRIEGLER, J.

We concur:

TURNER, P.J.

BAKER, J.